IN THE

Supreme Court of the United States

October Term 1971.
No. 70-5061

THOMAS KIRBY,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Appellate Court of the State of Illinois, First District

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Interest of Amicus Curiae

The State of California, as the most populous of the fifty States, has in the past four years had substantial experience through its law enforcement agencies in attempting to conform police identification procedures to the 1967 rulings by this Court in *United States v. Wade,* 388 U.S. 218, *Gilbert v. California,* 388 U.S. 263, and *Stovall v. Denno,* 388 U.S. 293.

Moreover, the State of California desires to indicate to this Court the opinion of *amicus curiae* that the holding in *People v. Fowler,* 1 Cal. 3d 335 [461 P.2d 643] (1969), relied upon by the present petitioner, is erroneous in its conclusion that the above-cited decisions of this Court require the presence of counsel at lineups conducted prior to the indictment stage of a criminal proceeding.

Question Presented

The petition for writ of certiorari was granted limited to the following question:

> "Whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment showup at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred." (A. 55.) 402 U.S. 995.

Statement of the Case

A. History of the Case

In an indictment returned by the Grand Jury before the Circuit Court of Cook County, Illinois, on April 8, 1968, petitioner Thomas Kirby and Ralph Bean were jointly charged with the robbery of Willie Shard. Counsel was appointed to represent petitioner, and a plea of not guilty was entered. (A. 1.)

Petitioner moved to suppress certain identification testimony and physical evidence, which motions were denied. (A. 1-2, 49.) Bean's motion to suppress physical evidence seized from his person at the time of his arrest was granted. (Pet. Br. 5; Resp. Br. 4.) Trial was by jury, and after the trial court's denial of petitioner's motion for a directed verdict, petitioner was found guilty as charged. (A. 2.)

Petitioner's motions for new trial and in arrest of judgment were denied. On August 1, 1968, petitioner was sentenced to the state penitentiary for a term of five to twelve years. (A. 2.)

Petitioner filed notice of appeal. (A. 2.) On March 10, 1970, the Appellate Court of Illinois, First District, Second Division, affirmed the judgment of conviction in an opinion reported as *People v. Kirby*, 121 Ill.

App. 2d 323 [257 N.E.2d 589] (1970). (A. 3, 49-54.) On October 5, 1970, the Supreme Court of Illinois denied petitioner's petition for leave to appeal. (A. 3.)

The petition for writ of certiorari and motion to proceed *in forma pauperis* were filed on December 3, 1970, and were granted by this Court on May 24, 1971. (A. 3, 55.) 402 U.S. 995.

B. Statement of Facts[1]

At 4:30 p.m. on February 20, 1968, Willie Shard was accosted by two men. He "got a real good look at them" when both of them approached him, while they were robbing him, and also when they departed. One grabbed him around the neck and the other removed the contents of Mr. Shard's pockets, which comprised $140 in traveler's checks, $30 or $35 in cash, his wallet, and all his identification cards, including his social security card. (A. 18-20, 22-23, 27-28.)

On the following morning Mr. Shard went to the police station and reported the crime. (A. 20-21, 23.) He gave the police a detailed physical description of his assailants: both had dark brown skin, were between 5'5" and 5'7" in height, and weighed 140-150 pounds.[2] (A. 23.)

On February 22, 1968, the day after Mr. Shard had reported the robbery to the police, Police Officers Rizzi and Panepinto were on patrol in Chicago. At ap-

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[1]In view of the issue before this Court, the Statement of Facts is taken from both the trial and the hearings on the pretrial motions to suppress identification testimony and physical evidence.

[2]At one of the pretrial hearings petitioner was described by one of the police officers as approximately 5'5" in height. Petitioner's weight is not reflected by the record. (A 13.)

proximately 11:00 a.m. Officer Panepinto observed two male pedestrians, whom he subsequently identified as petitioner and Bean, and remarked, " 'there goes a guy [meaning petitioner] that looks like he's on the Daily Bulletin.' " (A. 29-30, 33-34).

The two men were shown the bulletin, which bore the photograph of a suspect. (A. 11.) Petitioner was asked whether his name was Hampton, the suspect listed on the bulletin as "wanted in the first area for con game." When petitioner responded in the negative, Officer Panepinto said, " 'You sure look like Hampton. Show some identification.' " Upon opening his wallet and while it was still in his hand, petitioner revealed the presence of traveler's checks and a social security card all bearing the name Willie Shard.[8] Asked what they were, petitioner responded, " 'This is play money.' " Asked who was Willie Shard, he stated, " 'Oh, I won it in a crap game.' " The two men were then placed under arrest and were brought to a large squad room in the police station, where it was determined that the traveler's checks had been taken in the robbery of Willie Shard. (A. 10, 13, 15, 30-31, 35, 47.)

A "couple of hours later" Mr. Shard arrived at the station. (A. 31.) He had received a call asking him (Shard) to come down to the station. Mr. Shard and Officer Marsicek testified at trial that the two policemen who brought Shard to the station "didn't tell me anything. They just asked was I robbed and I said

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[8]Bean was searched at this time and was found to have on his person other items of identification bearing the name Willie Shard. (A. 12.) However, the physical evidence obtained from Bean's person was ordered suppressed at the hearing on the pretrial motion. (Pet. Br. 5; Resp. Br. 4.)

'yes.' They said, they asked me did I know them if I seen them and I told them 'yes.'." (A. 21, 24, 46-48.)

After arriving at the station, Mr. Shard "walked in and he said, 'Those are the two men that robbed me.'" No one prompted him or coached him prior to his entering the room. (A. 31.) His identification was "instantaneous." (A. 36.) Other persons were present, but Mr. Shard did not "pay much attention" to them. (A. 24, 26.) Thereafter petitioner and Bean were asked to stand up, and Mr. Shard remarked, "'These are the men.'" (A. 31-32.) Mr. Shard had not been told that his traveler's checks had been found on the two suspects whom he identified. (A. 27.) Mr. Shard testified that no police officer made any suggestion to him regarding the identity of the two men at the station. (A. 21.)

Both petitioner and Bean testified that they were not advised of "a right to have an attorney present prior to be[ing] identified by the victim." (A. 16-17.)

At the trial Mr. Shard was asked to observe petitioner and codefendant Bean and again indicated that he was "sure" that they were the persons who had robbed him. (A. 28.)

Summary of Argument

This Court should reconsider its restrictive holdings in the *Wade* and *Gilbert* cases because requiring the presence of counsel at pretrial identification confrontations is a burdensome and ineffective method of dealing with abuses in this area. Counsel has no right to prevent or alter the conduct of a lineup and may actually interfere with the lineup. Counsel's only useful

function would be that of a witness (a poor one) to the confrontation, a role which conflicts with counsel's professional ethics. Nor is it apparent why a pretrial lineup, unlike either the indictment procedure itself or other identification procedures, is so crucial a stage as to require the presence of counsel.

In the alternative these considerations at least militate against extending the rules of *Wade* and *Gilbert* to pre-indictment identifications, particularly since those decisions speak in terms of *post*-indictment lineups conducted long after counsel had been appointed. The pre-indictment stage is a non-critical one because until the indictment or other accusatory pleading is filed, the objective of law enforcement officials is merely to identify the perpetrator of the offense, not to convict him. Thus the delay attending the requirement that counsel be present would only serve to delay the innocent suspect's exculpation and release without protecting his rights or those of the guilty defendant.

The facts of the present case provide a graphic illustration of the non-critical nature of the identification stage and of the needless burden imposed by a requirement that counsel be present. If the presence of counsel was required a couple of hours after petitioner's arrest, trial courts will be hard-pressed to decide at what point, up to and including the on-the-scene confrontation, the right to counsel ceases to exist.

ARGUMENT

Experience Having Shown That the Rules Promulgated in the Wade and Gilbert Cases Do Not Effectively Serve the Purpose of Protecting the Rights of Criminal Suspects, the Restrictive Holdings of These Cases Should Be Reconsidered or in Any Event Should Not Be Extended so as to Require Uselessly the Presence of Counsel at Pre-Indictment Confrontations

In 1967 this Court held that a post-indictment lineup, in which the suspect is displayed to potential witnesses for the purpose of possible identification, is a critical stage of the proceedings against an accused and that the suspect therefore has a right to counsel at the lineup. *Gilbert v. California,* 388 U.S. 263; *United States v. Wade,* 388 U.S. 218. The Court also held that an in-court identification by a witness to whom the accused was exhibited prior to trial in the absence of counsel must be excluded unless it can be established that the in-court identification was untainted by the pre-trial identification.

However in *Stovall v. Denno,* 388 U.S. 293, the Court, recognizing that "it may confidently be assumed that confrontations for identification can be and often have been conducted in the absence of counsel with scrupulous fairness and without prejudice to the accused at trial," *id.*, 299, found that considerations of justice permitted restricting the *Wade-Gilbert* rules to prospective application, unlike the right to counsel at trial or on appeal from a criminal conviction. Undoubtedly the Court's willingness thus to restrict its newly-promulgated rules was premised in part upon the availability of basic due process grounds as a basis upon which to attack pre-*Wade-Gilbert* lineups.

While perhaps attractive on a theoretical level, the rules requiring the presence of counsel at post-indictment confrontations present numerous substantial difficulties (some insurmountable) in their practical application, without effectively adding to the protection of an accused's rights. It is for this reason that *amicus curiae* joins respondent in urging this Court to reconsider its experiment of four years in effecting the right to counsel by means of rules excluding lawyerless confrontations.

As one scholarly inquiry points out,

> ". . . . the precise role the lawyer is to play at lineups is not immediately clear, nor does the Court make it so. There is, moreover, reason to question how effectively the lawyer can perform any of the several tasks expected of him."
>
> Note, *Lawyers and Lineups*, 77 Yale L.J. 390, 393 (1967).

Another commentator notes,

> "A review of the role of counsel at lineups indicates the limited nature of the services he can perform. In fact, there are some indications that a lawyer's presence may hinder the effective use of the lineup as an investigatory technique. . . ."
>
> Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. Rev. 339, 394 (1969).

> "[T]he use of the lawyer at a lineup is a cumbersome and awkward mechanism for the correction of the kinds of lineup and confrontation abuses pointed out by the Court. Less time consuming, more appropriate tools are readily available. . . ." *Id.*, 341.

Congressional reaction to the *Wade-Gilbert* rules is unambivalently disapproving. *See* 18 U.S.C. § 3502; 114 Cong. Rec. 6039-42 (daily ed. May 21, 1968).

Among the reasons for this Court to reconsider its closely-decided holdings in the *Wade* and *Gilbert* cases are the following:

1. A lawyer clearly has no right to prevent the police from conducting a particular type of pretrial identification, nor to alter the conduct of the confrontation. Because this Court held that the placing of a suspect in a lineup does not violate his privilege against self-incrimination, the lawyer may not advise his client to refuse to be observed in the lineup or to refuse to utter words for voice-identification purposes. Thus the presence of an attorney is at best useless at the time of the lineup and may even encourage unlawful obstructionism on his part. *Cf. People v. Williams,* 3 Cal. 3d 853 [478 P. 2d 942] (1971). The lawyer will view his duty not as that of ensuring a fair lineup designed to ascertain the true identity of the offender, but instead as that of preventing his client from being identified as the perpetrator of the offense under investigation. *See* dissenting opinion of White, J., in *United States v. Wade, supra* at 256-58.

2. Particularly if *Wade* and *Gilbert* are extended to pre-indictment lineups (especially where conducted in small communities or rural areas, or where an individual of unusual physical characteristics is involved), the presence of counsel results in impossible demands for a lineup of persons of almost identical height, weight, hair color, skin color, body type, and ethnic origin that would tax the resources of even the central-casting department of a major motion picture studio,

let alone the average police station whose time, energy, and manpower are usually fully employed in performing the more traditional law enforcement tasks of detecting and apprehending those suspected of crime, and responding to the multitude of calls for assistance that characterize the day-to-day functions of police departments. Is the role of the police officer conducting the lineup to be reduced to that of a stage manager—or is defense counsel to assume such a role? Difficult questions also arise with respect to the manner in which law enforcement agencies may properly obtain, or detain, the cast for a lineup that is deemed constitutionally desirable by counsel.

3. The presence of an attorney at the lineup is of use at the trial only to the extent that the attorney, contrary to professional canons of ethics, may become a witness as to the circumstances attending the conduct of the lineup. Thus in this capacity the attorney is hardly useful at trial; he makes a poor witness, and could more effectively be supplanted by almost anyone else who was present at the time of the lineup.

4. It is difficult to perceive, especially in light of the foregoing observations, what is so particularly crucial about a post-indictment lineup that would constitutionally require the presence of counsel, since counsel is not viewed as an essential participant at the grand jury proceedings which themselves lead to an indictment; a suspect who choses to testify before the grand jury has no right to have his counsel present, nor may his counsel attend and cross-examine the witnesses who appear. Nor apparently does counsel have any constitutionally required role to play when a suspect is called upon to give other physical, nontestimonial evidence against himself, nor when an identification pro-

cedure is employed which utilizes a series of photographs of possible suspects, *Simmons v. United States*, 390 U.S. 377, or when a photograph of a lineup is shown for identification purposes. *People v. Lawrence*, 4 Cal. 3d 273 [481 P.2d 212] (1971), *petition for cert. pending*.

Amicus curiae submits in the alternative that in the event this Court is unwilling to reconsider its holdings in the *Wade* and *Gilbert* cases, it should at least refuse to extend them to the pre-indictment stage of criminal proceedings. The state and lower federal courts are divided on this question (see Resp. Br. pp. 16-17 (n.4)), and *amicus curiae* submits that the California Supreme Court's extension of *Wade-Gilbert* to the pre-indictment stage was not compelled by those decisions and should not be followed. *See People v. Fowler*, 1 Cal. 3d 335 [461 P.2d 643] (1969).

As Respondent's Brief points out, the holdings in *Wade* and *Gilbert* are couched in terms of the confrontations in issue being *post*-indictment lineups. *See also Simmons v. United States*, 390 U.S. 377, 382-83. Necessarily the situation can clearly be distinguished where law enforcement officers conduct a lineup subsequent to the indictment or information stage, *i.e.*, a stage by which counsel has already been retained or appointed, without the officers notifying such counsel.[4]

Moreover, like the indictment procedures themselves, the pre-indictment lineup or showup is not so critical a stage of the proceedings as to require the presence of counsel, for the reason that until a charge is filed the

[4]The lineup in *Wade* took place 15 days after appointment of counsel and 39 days after arrest. 388 U.S. at 220. The lineup in *Gilbert* was 16 days after indictment and after appointment of counsel. *Id.*, 269.

objective of law enforcement officials is merely to identify the perpetrator of the offense in question and not to convict him. Thus the innocent suspect in particular has a common, non-adversary interest with the police: the expeditious conduct of an identification procedure which may bring about his release from custody.

The arguments advanced above in support of a reconsideration of *Wade-Gilbert* militate *a fortiori* against extending the rules of those cases to lineups conducted prior to the indictment stage. If the police must delay the identification confrontation until counsel's convenience may be suited (or until counsel may be appointed), perhaps subjecting the preferences of the police and the identifying victims and witnesses to the whim of counsel, the conducting of lineups will probably be delayed in most cases until after the indictment stage, and the innocent suspect's exculpation and release will therefore be delayed.[5]

A rule requiring the presence (or waiver) of counsel a mere two or three hours after the arrest, the circumstances presented in the case at bar, would not be susceptible of easy administration by the courts, which would be hard-pressed to draw a reasoned distinction between those situations where the right to counsel attached and those where it did not. It would be difficult to formulate practical rules permitting a confrontation between victim and suspect in the absence of counsel near the scene of the crime, moments after the crime, while perhaps forbidding such a confron-

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[5] "'If innocent men had been apprehended should they await the assembling of a lineup, and the summoning of counsel, while the real perpetrators put more time, and presumably distance, between themselves and the focal point of the offense?'" *People v. Floyd*, 1 Cal. 3d 694, 714 [464 P.2d 64, 76] (1970). *See also Stovall v. Denno*, 388 U.S. 293, 302.

tation twenty minutes or an hour later at the neighboring police station or elsewhere.[6]

Finally, the facts of the present case (set forth in detail at pages 3-5, *infra*) graphically illustrate the inutility of counsel at an identification confrontation, particularly one conducted at the pre-indictment stage, and the pointless burden which a pre-indictment requirement of counsel would place upon the administration of justice.

On the day after the commission of the robbery in question, petitioner and another suspect were arrested, and a "couple of hours later" (A. 31) the victim arrived at the police station where the two suspects were being held. The victim immediately, and without any influence or suggestion by the officers, walked up to the two suspects and identified them as his assailants.

Since petitioner had to have counsel appointed at trial (A. 1), presumably he would have been unable to retain counsel at the confrontation. It is hard to imagine that the Constitution required the Chicago police officers to obtain counsel to represent petitioner at the confrontation between petitioner and the victim within a "couple of hours" (A. 31) after petitioner's arrest.

And if the police were constitutionally compelled to delay the confrontation until whatever time counsel

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[6]The California Supreme Court has held *Wade-Gilbert* applicable even to pre-arrest confrontations. *People v. Martin*, 2 Cal. 3d 822, 825-28 [471 P.2d 29, 31-34] (1970). That court has also held that a waiver of rights upon interrogation does not waive rights at a lineup conducted later the same day, *People v. Banks*, 2 Cal. 3d 127, 136 [465 P.2d 263, 270] (1970), but that the suspect need not be informed that the purpose of the lineup is possible identification in order for his waiver of counsel to be effective. *People v. Tribble*, 4 Cal. 3d 826, 833-34 [484 P.2d 589, 594] (1971).

could be obtained, a clear-cut illustration is presented of how petitioner, if innocent of the charges, would needlessly have had to remain in custody and how the police investigation of the robbery would have had to remain in limbo pending the outcome of the delayed confrontation.

The non-critical nature of the identification confrontation in the context of a constitutional requirement of counsel is apparent from the fact that the victim had a "real good look" at the two suspects at the time of the robbery (A. 18-19, 22-23, 27-28) and was able to furnish a detailed and apparently accurate physical description of the suspects to the police prior to petitioner's arrest. (A. 13, 23.) Moreover, at the time of his arrest, petitioner had on his person traveler's checks and a social security card all bearing the victim's name, a circumstance concerning which petitioner gave conflicting and evasive explanations. (The victim was unaware of the incriminating property found on the suspects when he made the identification.) And the victim's observation of his assailants at the time of the robbery was sufficient to enable him to make a "sure" identification of them in court. (A. 28.)

What could counsel have done for petitioner had he been present at the stationhouse confrontation between the victim and the two suspects two hours after the arrest? In what way would the fairness of petitioner's trial have been enhanced had counsel been present at the confrontation? Could petitioner's identification as one of the robbers of Willie Shard have been altered, or the issue of petitioner's guilt or innocence been affected, by the presence of an attorney at the showup?

To ask these questions is to place the abstract question presently before this Court in the constitutionally pertinent context of the practical realities which daily confront police officers, prosecutors, and defense attorneys. And the obvious answers to these questions compel the conclusion that this Court's formulation of a rule of constitutional law requiring the presence of counsel at all pretrial identification confrontations would be the implementation of a meaningless ritual contrary to the interests of innocent suspects, useless as a protection of the rights of innocent or guilty suspects, needlessly burdensome on law enforcement agencies, and unsusceptible of application in the trial courts.

Conclusion

For the foregoing reasons *amicus curiae* State of California joins respondent State of Illinois in urging that the judgment of the Appellate Court of Illinois be affirmed.

Respectfully submitted,

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